Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

M.A. BAHETH CONSTRUCTION COMPANY, INC., DEBTOR

M. A. BAHETH & CO., INC.,

Petitioner,

v.

MARTIN SCHOTT AND FIDELITY DEPOSIT INSURANCE COMPANY OF MARYLAND,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in imposing sanctions on appellants by finding that it had authority to dismiss appellant's appeal for failure to comply with Fed. Rule App.. P. 6(b)(2)(ii) without proceeding to the merit or determining whether there were any mitigating circumstances in the case, ruling which conflicts with the holding of the Ninth Circuit that holds that a district court must first consider alternative sanctions in lieu of dismissal for failure to comply with Rule 8006 unless the case presents egregious circumstances

2. Whether the Court of Appeals for the Fifth Circuit erred in affirming the district court's ruling that the bankruptcy court had subject matter jurisdiction over a claim between a third-party nondebtor and a U.S. Trustee when the claim is not related to or have any impact on the bankruptcy estate and whether the appeals court should have first determined whether subject matter jurisdiction existed and if so whether the decisions, opinions, and orders of the bankruptcy court are void

LIST PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

M.A. Baheth Construction Company, Inc., and M.A. Baheth & Co., Inc. have no parent companies or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, M.A. Baheth & Co., Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this proceeding on August 8, 1997, in order to resolve the conflict between the Fifth and the Ninth Circuit Court of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published. It is reprinted in Appendix A hereto (App.A infra., p. App.1)

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein was enter August 8, 1997. (App. A, infra., page App.1). Under the Rules of this Honorable Court, this Petition for Writ of Certiorari is timely filed within extension of time granted by this Court.

The Jurisdiction of this Honorable Court is invoked under 28 U.S.C.§ 1254 (1).

STATUTES INVOLVED

The relevant statutory and other provisions involved are:

A. 28 U.S.C. 157(a) which provides that:

> The district courts may, . . . refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district."

B. Fed. R. App. P.Rule 6(b)(2)(ii) which provided that:

Within 10 days after filing of the notice of appeal, the appellant shall file with the clerk possessed of the record

assembled pursuant to Bankruptcy Rule 8006, a statement of the issues to be presented on appeal and a designation to the record to be certified and transmitted to the clerk of the court of appeal.

C. Bankr. Rule 8006, which provides in part that:

Within 10 days after filing the notice of appeal, as provided by Rule 8001(a), ..., the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.

STATEMENT OF THE CASE

This case involves a claim of a third-party, nondebtor, against a U.S. Trustee, Martin A. Schott (Hereinafter referred to as "Mr. Schott" or "The Trustee") and the insurance company on his surety bond, for wrongful issuance of a Temporary Restraining Order . On or about October 6, 1993, Mr. Schott, as the acting trustee in the bankruptcy of M.A. Baheth Construction Co., Inc., (a completely different corporation), Case No. 93-1072, instituted an adversary proceeding against Baheth Corp.,M.A. Baheth & Co., Inc., M.A. Baheth D/B/A Bakan, Ltd., M.A. Baheth D/B/A Bakar LTD., M..A. Baheth, individually, to compel the turnover of alleged property of the estate and/or to recover fraudulent conveyances pursuant to a revocatory action.

As a part of the adversary proceeding, Mr. Schott filed an application for a temporary restraining order and preliminary injunction which included M.A. Baheth and Company, Inc. Mr. Schott alleged that the named defendants had in their possession funds and/or other property belonging to the bankruptcy estate mentioned herein. Mr. Schott further alleged that all the defendants were in possession of those assets of the estate at that time and unless they were temporarily restrained

from using, or disposing of or in any manner encumbering these asserts, immediate and irreparable harm would result to plaintiff.

On or about October 7, 1993, M.A. Baheth and Company, Inc., submitted a sealed bid for a Corp. of Engineer Levee Project, Solicitation No. DACW 29-94-B-0009. When the bids were publicly opened, M.A. Baheth and Company, Inc., was low bidder at $3,645,424.00. Therefore, should have been awarded the bid as low bidder. On the same date as mentioned above, Mr. Baheth discussed the job with representatives of the Corp. of Engineer who informed him that the Corp. of Engineer could not do business with M.A. Baheth & Company, Inc., because there was a restraining order against that company doing business. The project under Solicitation No. DACW 29-94-B-0009 was subsequently awarded to the next lowest bidder.

Appellant maintained at all time that contrary to the representation made in the application for the restraining order, M.A. Baheth and Company, Inc., was not in possession of $37,999.00 of the debtor's funds. In addition, the check attached to the application as an exhibit in support of the allegations was dated May 5, 1991, more than two years prior to the date the bankruptcy of M.A. Baheth Construction Co., Inc., was filed, which was April 6, 1993. Hence, the date on the face of the $37,999.00 check showed it was not timely as a revocatory action under LSA Civil Code art 2036.

Appellant averred that there was no transfer, especially any fraudulent transfer, of the debtor's property, nor was there any proof to justify the request for or the issuance of the temporary restraining order; nor was there any allegations of actual intent to hinder, delay or defraud a creditor, or that the debtor received less than reasonable equivalent value in the alleged transaction, as required by law.

Appellant further averred that the said temporary restraining order was reissued and reissued for approximately six (6) months, and that the reissuances continued to cause damage. Thus, appellant maintained that Mr. Schott wrongfully and egregiously issued the temporary restraining order against M.A. Baheth and Company, Inc. By: (a) failure to properly investigate allegations prior to issuance of the temporary restraining order, without prior notice; (b) using evidence in support of his application that was clearly untimely on its face: and (c) continuing the hearing on the preliminary injunction without just cause and then dismissing it without a hearing.

On July 6, 1995, M.A. Baheth & Company, Inc., through then counsel of record, Stephen Young filed a complaint in the United States District Court, Middle District of Louisiana against Martin a. Schott and Fidelity and Deposit Company of Maryland. On December 19, 1995, counsel for Mr. Schott filed a Motion for Reference to Bankruptcy Judge, and service of the filing was mailed on or about December 20, 1995. On December 22, 1995, three (3) days following the filing of the motion, an order was signed referring the case to the bankruptcy court. The case was referred to the bankruptcy court based on the allegation of counsel in the motion that "this is a proceeding arising under Title 11 in or related to a bankruptcy case under Title 11 because it deals with Martin A. Schott in his capacity as trustee for M.A. Baheth Construction, Inc."

On or about March 22, 1996, defendant, Fidelity and Deposit Company of Maryland filed a motion to dismiss or in the alternative a motion for summary judgment. Hearing on defendant's motion was noticed for April 19, 1996, and objections were required by April 15, 1996. The appellant maintains that it had no knowledge that the motion had been filed or that Mr. Young did not intend to object to the motion or appear at the hearing, until about April 23, 1996.

On April 26, 1996, present counsel initially filed a motion to substitute counsel. (See Motion to Substitute Counsel, App. D , infra., page App.11). The clerk of court's office of the bankruptcy court returned the motion with cancelled stamped over the date stamp and attached notation that the documents were returned because the case was closed on April 19, 1996, the same day the summary judgment was granted. (App. E, infra., page App.13). The motion was refiled. It was not until May 9, 1996 that the order permitting present counsel to substitute was signed. (App. D , infra., page App.12).

On May 3, 1996, Baheth filed a Notice of Appeal regarding the summary judgment and a motion to file appeal out of time. On May 15, 1996, the motion for an extension of time to file the notice of appeal was amended to include a more complete reason for the extension. On May 9, 1996, the bankruptcy court judge signed an order denying the motion to extend the time for filing the notice of appeal. On May 20, 1996, the bankruptcy court judge signed an order directing that the Notice of Appeal (#16) and Notice of Appeal (#17) on the docket sheet be stricken from the Adversary Proceeding. (App. F, infra., page App. 15). From the May 20,1996 order denying the plaintiff an extension of time to file the notice of appeal plaintiff appealed to the United States District Court for the Middle District of Louisiana. The district court affirmed the order of the bankruptcy judge dated May 20, 1996, from that judgment, plaintiff appeals to the Court of Appeals for the Fifth Circuit, which dismissed plaintiff's appeal, without considering the merits, for failure on the part of plaintiff to comply with rule requiring plaintiff to serve the appellees with statement of issues and designation of record pursuant to F.R.A.P. Rule 6(b)(2) (ii), from that judgment the appellant Appeals to this Honorable Court.

REASON FOR GRANTING WRIT

The court of appeals has decided an important federal question it never addressed before which has far departed from the accepted and usual course of judicial proceeding.

I. THE COURT FAILED TO ADDRESS WHETHER A BASIS FOR THE BANKRUPTCY COURT'S SUBJECT MATTER JURISDICTION EXISTED PRIOR TO DISMISSING APPELLANT'S APPEAL

Bankruptcy courts are courts of limited jurisdiction, whose scope is statutory defined. In *In re Majestic Energy Corp.*, 835 F.2d 87, 89 (5th Cir.1988). Where a federal court lacks jurisdiction, its decisions, opinions, and orders are void. Id. A district court has original, but not exclusive, jurisdiction of matters "arising under," "arising in," or "related to" a case under Title 11. 28 U.S.C. 1334(b). Because Section 1334(b) defines jurisdiction conjunctively, a district court has jurisdiction over the subject matter if it is at least related to the underlying bankruptcy. 835 F.2d at 90. A matter is "related to" a case under Title 11 if the outcome "could conceivably have any effect on the estate being administered in bankruptcy." *In re Wood*, 825 F.2d 90, 93 (5th Cir.1987).

In *In Matter of Zale Corp.*, 62 F.3d 746, (C.A.5 (Tex.) 1995), third parties, Feld and NUFIC challenged the entry of an injunction by the bankruptcy court arguing that the bankruptcy court exceeded its power under section 105 of the Bankruptcy Code. See 11 U.S.C. § 105(a) (1988) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."). The court concluded that before it addressed whether the bankruptcy court properly exercised 105 power to issue the injunction, it had to first examine whether a basis for the bankruptcy court's subject matter jurisdiction existed. 62 F.3d 751

Subject matter jurisdiction and power are separate prerequisites to the court's capacity to act. Subject matter jurisdiction is the court's authority to entertain an action between the parties before it. Power under section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction. *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.),* 885 F.2d 621, 624 (9th Cir.1989) (citations omitted); see also *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.),* 910 F.2d 784, 787 (11th Cir.1990) (noting that first step in determining the existence of bankruptcy jurisdiction is whether federal jurisdiction exists in the district court); *United States Dep't of Air Force v. Carolina Parachute Corp.,* 907 F.2d 1469, 1475 (4th Cir.1990) (stating that 105 injunction cannot exceed court's jurisdiction).

Because Feld and NUFIC were not parties to the bankruptcy, the actions at issue between noncreditors--NUFIC and Feld--and a nondebtor--CIGNA--are third-party actions. Accordingly, the court had to determine if those actions were "related to" the bankruptcy case. See *Quattrone Accountants, Inc. v. I.R.S.,* 895 F.2d 921, 926 (3d Cir.1990) Since the court was determining the bankruptcy court's jurisdiction over a case between two non-debtors, it had to examine the 'related to' language of Section 1334."

The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in and limited by statute. Title 28 U.S.C. § 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The district courts may, in turn, refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 to the bankruptcy judges for the district." 28 U.S.C. § 157(a). *Celotex Corp. v. Edwards*, 514 U.S. 300, ----, 115 S.Ct. 1493, 1498, 131 L.Ed.2d 403 (1995).

"For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between proceedings 'arising under,' 'arising in a case under,' or 'related to a case under,' title 11."). "Instead, to ascertain whether jurisdiction exists, 'it is necessary only to determine whether a matter is at least "related to" the bankruptcy.' " *In re Walker*, 51 F.3d at 569 (quoting *In re Wood*, 825 F.2d at 93) (other citations omitted).

Section 1334's reference to cases related to bankruptcy cases is primarily intended to encompass tort, contract, and other legal claims by and against the debtor, claims that, were it not for bankruptcy, would be ordinary stand-alone lawsuits between the debtor and others but that section 1334(b) allows to be forced into bankruptcy court so that all claims by and against the debtor can be determined in the same forum. A secondary purpose is to force into the bankruptcy court suits to which the debtor need not be a party but which may affect the amount of property in the bankrupt estate. Once they are shoehorned into the bankruptcy court on the authority of section 1334(b), such suits can then be stayed by authority of section 105 of the Bankruptcy Code. *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161-62 (7th Cir.1994) (citations omitted) (emphasis added).

Nonetheless, "a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Celotex,* 514 U.S. at ----, 115 S.Ct. at 1499. "As a dispute becomes progressively more remote from the concerns of the body of federal law claimed to confer federal jurisdiction over it, the federal interest in furnishing the rule of decision for the dispute becomes progressively weaker." *Zerand-Bernal Group, Inc.*, 23 F.3d at 162. For the bankruptcy court to have subject matter jurisdiction, therefore, some nexus must exist between the related civil proceeding and the Title 11 case. *In re Lemco Gypsum, Inc.*, 910 F.2d at 787. Otherwise, "an overbroad construction of 1334(b) may bring

into federal court matters that should be left for state courts to decide." *In re Lemco Gypsum, Inc.*, 910 F.2d at 787-88 (citations omitted).

In *In re Wood,* 825 F.2d at 93, the Fifth Circuit adopted the Third Circuit's test for determining whether a matter is "related to" a bankruptcy case and held that a matter is "related to" the bankruptcy case for 1334 purposes if " 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.' " *In re Wood, 825 F.2d at 93 (quoting Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir.1984)); accord In re Walker, 51 F.3d at 569. Moreover, " 'an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and ... in any way impacts upon the handling and administration of the bankrupt estate.' " *In re Walker,* 51 F.3d at 569 (quoting *Pacor, Inc.*, 743 F.2d at 994). Conversely, the bankruptcy court has no jurisdiction over a matter that does not affect the debtor. See *Celotex,* 514 U.S. at ---- n. 6, 115 S.Ct. at 1499 n. 6 (reciting Pacor test and commenting that "whatever test is used, these cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor").

We begin our analysis by noting that a large majority of cases reject the notion that bankruptcy courts have "related to" jurisdiction over third-party actions. See, e.g., *In re Walker*, 51 F.3d at 569; cf. *Homsy v. Floyd (In re Vitek),* 51 F.3d 530, 538 n. 39 (5th Cir.1995) (wondering " 'out loud' about the extent, if any, to which the tools of injunctive relief and settlement (or 'compromise') are appropriate . . . in dealing with the rights of third party creditors of the bankruptcy" and stating that "the broad latitude afforded bankruptcy courts in fashioning remedies should not be used in a way that tramples on the

rights of dissenters among creditors or non-parties to the proceedings").

Those cases in which courts have upheld "related to" jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, [1] or because the dispute over the asset would have an effect on the estate.[2] Conversely, courts have held that a third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate [3]and the dispute has no effect on the estate. [4]Shared facts between the third-party action and a

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[1] See, e.g., In re Wood, 825 F. 2d at 93-94, holding that "related to" jurisdiction over third-party action existed because assets at issue in claims against debtor were property of estate.

[2] See, e.g. 8300 Newburgh Rd. Partnership v. Time Constr., Inc. (In re Time Constrr. Inc.) 43 F. 3d 1041, 1045 (6th Cir. 1995) (explicitly applying same standard as Fifth Circuit and noting in dicta that third-party action was related to bankruptcy because outcome of action aginst sole shareholder directly impacted value of debtor's shares); Abramowitz v. Palmer, 999 F. 2d 1274, 1278 (8th Cir. 1993) (holding that third-party action was related to bankruptcy because debtor's rights in jointly-held property could not otherwise be determined)

[3] See, e.g., Eastover Bank for Sav. v. Sowashee Venture (In re Austin Dev. Co.), 19 F.3d 1077, 1084 (5th Cir.) (holding that issue of third-party creditor's rights was not "related to" bankruptcy after third-party lease had been rejected and was not part of bankruptcy estate), cert. denied, --- U.S. ----, 115 S.Ct. 201, 130 L.Ed.2d 132 (1994); Graziadei v. Graziadei (In re Graziadei), 32 F.3d 1408, 1410 (9th Cir.1994) (holding that third-party dispute over property exempt from estate did not come under bankruptcy court's jurisdiction); In re Edwards, 962 F.2d 641, 643 (7th Cir.1992) (holding that third-party adversary complaint did not confer jurisdiction where property at issue was not property of estate).

[4] See, e.g., Specialty Mills, Inc., 51 F.3d at 775 (holding that dispute between third party and debtor's bank did not relate to bankruptcy and therefore bankruptcy court lacked subject matter jurisdiction); In re Edwards, 962 F.2d at 643 (holding that adversary complaint did not confer jurisdiction where determination of dispute would not impact rights of

debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy. [5]Moreover, judicial economy alone cannot justify a court's

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debtor); Gardner v. United States (In re Gardner), 913 F.2d 1515, 1519 (10th Cir.1990) (rejecting jurisdiction over action concerning lien on nonestate property because it would have no effect on distribution of assets or administration of estate); Washburn & Kemp, P.C. v. Committee of Dalkon Shield Claimants (In re A.H. Robins Co.), 846 F.2d 267, 270 (4th Cir.1988) (holding that law firm's action against insurer for fees was not related to relationship between insurer and debtor insured, even though law firm represented debtor on behalf of insurer); National City Bank v. Coopers & Lybrand, 802 F.2d 990, 994 (8th Cir.1986) (rejecting jurisdiction over action between debtor's auditors and third-party claimant because plan was already confirmed and action would have no possible effect on estate).

[5] See Community Bank of Homestead v. Boone (In re Boone), 52 F.3d 958, 961 (11th Cir.1995) (holding that debtor's tort suit against creditor was not related to bankruptcy because "although the claim ... will share the common factual issue [with a bankruptcy proceeding]," the common issue did not invoke jurisdiction); Specialty Mills, Inc., 51 F.3d at 774 ("There may be some convergence between [the debtor's] affairs and the dispute between [the third party] and [the debtor's bank]. However, that possibility does not impart 'related to' jurisdiction unless the dispute also affects [the debtor's] bankruptcy estate or the allocation of assets."); In re Lemco Gypsum, Inc., 910 F.2d at 789 ("Overlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of assets among creditors." (citations omitted)); Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 748-49 (7th Cir.1989) (concerning action by insurance company and rejecting jurisdiction over claims against insureds other than the debtor, because "[a]lthough the request ... has a nexus with the bankruptcy--in the sense that it would be convenient, and promote consistency, to resolve all questions concerning the policy at one go--it does not necessarily have a financial effect on the estate (or the apportionment among its creditors)."); In re Xonics, 813 F.2d at 131 ("The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose. That two creditors have an internecine conflict is of no moment, once all disputes about their stakes in the bankrupt's property have been resolved."); Pacor, Inc., 743 F.2d at 994 ("[T]he mere fact

finding jurisdiction over an otherwise unrelated suit. *In re Boone*, 52 F.3d at 961; *In re Lemco Gypsum, Inc.*, 910 F.2d at 789; Pacor, Inc., 743 F.2d at 994; see also *In re Kubly*, 818 F.2d at 645 ("Like other federal courts, a bankruptcy tribunal is one of limited jurisdiction. Its power must be conferred, and it may not be enlarged by the judiciary because the judge believes it wise to resolve the dispute."). Accordingly, the district court's desire to "foster and encourage and then preserve settlement in federal court" does not in and of itself confer jurisdiction.

The court must establish independently that a dispute is part of a bankruptcy case; the existence of power within the bankruptcy case does not imply an expansion of jurisdiction beyond it. To the contrary, it suggests that courts must be particularly careful in ascertaining the source of their power, lest bankruptcy courts displace state courts for large categories of disputes in which someone ... may be bankrupt. *In re Kubly*, 818 F.2d at 645. Accordingly, for example, a bankruptcy court may potentially include an injunction as part of a settlement only "once jurisdiction is established." *In re Davis*, 730 F.2d 176, 183-84 (5th Cir.1984).

In this case, the tort claims of M.A. Baheth and Company, Inc., was an unrelated action not within the scope of a bankruptcy court's jurisdiction. In *In re Gallucci*, supra., the Eleventh Circuit addressed the question of whether a compromise or settlement could establish bankruptcy jurisdiction over property of a third party not otherwise subject to the bankruptcy court's authority. In that case, the debtor had no interest in property owned by his mother. The bankruptcy trustee, however, claimed that the property belonged to the

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that there may be common issues of fact between a civil proceeding and a controversy involving the
the scope of [Sec. 1334(b)].").

estate because of a compromise the trustee entered into with a third party. In the compromise, the third party had quitclaimed the property to the trustee. Based on the quitclaim deed, the bankruptcy court ordered the debtor's mother to turn the property over to the estate.

The debtor's mother appealed, challenging the bankruptcy court's jurisdiction to order the turnover. She argued that because the third party had no authority to quitclaim her interest in the property, the compromise alone could not create jurisdiction. The trustee argued that the court could not look into the basis of the trustee's title, contending that the quitclaim deed "established jurisdiction by compromise, insulating from inquiry the nature of the property and its connection with the bankruptcy estate prior to settlement." *Id.* At 743.

The Eleventh Circuit rejected the trustee's argument, the court held that the bankruptcy court had "relied entirely upon the compromise," id., for its jurisdictional basis, and that the bankruptcy court had a duty to inquire into the compromise and determine if it actually impacted property of the estate or merely affected unrelated property. Id. at 744. Because the property had no effect on the estate absent the compromise, the court held that the compromise failed to establish a basis for jurisdiction. Id. Thus, the court held that parties could not accomplish through settlement what they could not attain directly--that is, bankruptcy court jurisdiction over the property. See *Id.* At 743 n. 16 (noting that if the trustee had brought action against the debtor's mother directly, "the bankruptcy court clearly would not have had jurisdiction" over the property).

We maintain that the reasoning of the Eleventh Circuit persuasive and applicable to the facts of this case. Because M.A, Baheth and Company, Inc., was not the debtor and because the property at issue--the wrongful issuance of a temporary restraining order claim--was not property of the

estate, nor did the action impact the administration of the estate or property of the estate, the bankruptcy court had no jurisdiction over the tort claim, absent the assertion that the appellant failed to object to the finding by the bankruptcy court that it was a "core proceeding." Nonetheless, the bankruptcy case has been dismissed. Moreover, no substantive basis for the finding that this was a "core proceeding" existed. Accordingly, Schott's attempt to establish jurisdiction should have failed and the case returned to the district court where originally filed.

The Fifth Circuit did not consider the merits of appellant's appeal, instead applied for the first time Fed. R. App. P. 6(B)(2)(iii) to dismiss the appeal for failure to serve statement of issues and designation or record on appellee . (App. A infra., page App.1).

II. THE FIFTH CIRCUIT'S OPINION DIRCTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN FITZSIMMONS AND IS CONTRARY TO GENERALLY ACCEPTED POLICY THAT THE COURT MUST FIRST CONSIDER ALTERNATIVE SANCTIONS IN LIEU OF DISMISSAL FOR FAILURE TO COMPLY WITH RULE 8006 UNLESS THE CASE PRESENTS EGREGIOUS CIRCUMSTANCES

Rule 6 of the Federal Rules of Appellate Procedure provides for appeal in bankruptcy cases. The appellee argues that appellant's appeal to the Fifth Circuit should be dismissed for noncompliance with the addition rules set out in (b)(2)(iii) of Rule 6, which provides in pertinent part as follows:

> . . . The record on Appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee as

> statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of appeals . . .

The appellee argued that this case should be treated as a bankruptcy case, appellant maintains that this is not a bankruptcy case and moreover, the bankruptcy court lacked subject matter jurisdiction to hear this case thus, it should not have been referred from the district court.

While the court of appeal stated that pursuant to Fed. R. App. P 6(b)(2)(iii) the appellant was required within 10 days to file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and designation of the record, it goes on to state that Baheth never filed a statement with the clerk of the court of appeal and designation of the record to be certified and transmitted.

Appellant maintains that this was not a bankruptcy case, thus Rule 6(b)(2)(iii) should not have been used as grounds to dismiss appellant's appeal. Moreover, if Rule 6(b)(2)(iii) was applicable, it alone did not justify imposing the most severe sanction on the appellant-dismissal of appeal. Such extreme sanctions are generally reserved for those cases that present egregious circumstances not present in this case.

The Fifth Circuit cited *Nielsen v. Price*, 17 F. 3d 1276, 1277 (10th Cir 1994) and *Serra Builders, Inc.v. John Hanson Savings Bank FSB*, 970 F2d.1309, 1311 (4th Cir. 1992) for the holding that other circuits have held that an appellant's failure to comply with procedural rules such as Rule 8006, warrants dismissal of appeal pursuant to Rule 8001(a). However the court did note that the Ninth Circuit in *Fitzsimmons v. Nolden*, 920 F. 2d 1468, 1472 (9th Cir. 1990), held that district court must first consider alternative sanctions in lieu of dismissal for failure to comply with Rule 8006 unless the case presents

egregious circumstances such as bad faith on the part of the appellant. In this case, appellant maintains that it should not have been sanctioned at all, but here the court failed to consider alternative sanctions in lieu of dismissal. Moreover, a determination of whether bankruptcy court subject matter jurisdiction existed was not determined prior to dismissing pursuant to Rule 6(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Linda Ritzie
921 N. Lobdell Avenue
Suite G
Baton Rouge, LA 70806
(504) 925-0586

Attorney for Petitioner
Counsel of Record

Appendix

APPENDIX A

In the Matter of M.A. BAHETH CONSTRUCTION CO., INC., Debtor.
M.A. BAHETH & CO., INC., Appellant,
v.
Martin A. SCHOTT, and Fidelity and Deposit Insurance Company of Maryland, Appellees.

No. 96-31325
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
Aug. 8, 1997.

Company brought action against bankruptcy trustee and surety on bankruptcy trustee bond, claiming losses caused by temporary restraining order obtained against company. After bankruptcy court dismissed case with prejudice, the United States District Court for the Middle District of Louisiana, John V.Parker, Chief Judge, denied company's motion to file appeal out of time, and company appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) failure to comply with rule requiring company to serve appellees with statement of issues and designation of record warranted dismissal, and (2) bankruptcy court had jurisdiction over action.

Appeal dismissed.

1. BANKRUPTCY k3778

Company's appeal from district court's denial of its motion for leave to file out of time appeal from bankruptcy court's dismissal of company's action against bankruptcy trustee and surety of bankruptcy trustee bond would be dismissed due to company's deliberate failure to comply with rule governing appeals from district court or bankruptcy appellate panel in bankruptcy case, which required company to serve statement

of issues and designation of record on appellees; company was not excused from complying with rule by its assertion that bankruptcy court lacked jurisdiction over case, and dismissal was not contrary to interests of justice. F.R.A.P.Rule 6(b)(2)(ii), 28 U.S.C.A.

2. BANKRUPTCY k3777

Failure to comply with requirement, under rule governing appeals from district court or bankruptcy appellate panel in bankruptcy case, that appellant must serve statement of issues and designation of record on appellee authorizes Court of Appeals, in its discretion, to impose sanctions including dismissal of appeal. F.R.A.P.Rule 6(b)(2)(ii), 28 U.S.C.A.

3. BANKRUPTCY k2164.1

Despite company's claim that bankruptcy court lacked jurisdiction over company's action against bankruptcy trustee and surety on bankruptcy trustee bond, company was bound to comply with bankruptcy court's judgment, and procedural consequences thereof, until and unless determination of bankruptcy court jurisdiction was overturned.

4. BANKRUPTCY k2058.1

Bankruptcy court had jurisdiction over company's action against bankruptcy trustee and surety on bankruptcy trustee bond, which claimed damages caused by temporary restraining order obtained against company, as action was at least related to bankruptcy case under Chapter 11, and, even if matter was non-core proceeding, company impliedly consented to court's entry of final judgment by failing to object to bankruptcy court's assumption of core jurisdiction. 28 U.S.C.A. 157(a),(c)(2), 636(c).

Linda Ritzie, Baton Rouge, LA, for Appellant.
Pamela Magee, Baton Rouge, LA, for Martin A. Schott, Appellee.

Eugene R. Preaus, Diane Lloyd Matthews, Preaus, Roddy & Krebs, New Orleans, LA, for Fidelity and Deposit Insurance Company of Maryland, Appellee.

Appeal from the United States District Court for the Middle District of Louisiana.

Before JONES, DeMOSS and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Because appellant has willfully refused to comply with FED.R.APP.P. 6(b)(2)(ii), applicable in appeals from bankruptcy court decisions, we dismiss.

PROCEDURAL HISTORY

On July 6, 1995, M.A. Baheth & Company, Inc. ("Baheth"), filed a complaint in federal district court alleging that Martin A. Schott, chapter 7 trustee, and Fidelity and Deposit Company of Maryland ("Fidelity") had wrongfully obtained a temporary restraining order against Baheth that caused it to lose a $3,645,424.00 construction contract. (FN1) The case was referred to bankruptcy court. On March 22, 1996, Fidelity filed a motion to dismiss, or alternatively, for summary judgment, and hearing was set for April 19, 1996. Baheth's counsel, Steven Young, received notice of this hearing, but neither Baheth nor Young
responded to the motion or attended the hearing. At the April 19th hearing, the bankruptcy court granted Fidelity's motion for summary judgment and dismissed Baheth's case with prejudice, and a copy of the written order issued on that date was sent to Baheth's counsel.

On April 26, 1996, Young filed a motion on Baheth's behalf to substitute Linda Ritzie as counsel. On May 3, 1996,

Baheth filed a notice of appeal of the April 19th order, along with a motion to file an appeal out of time. On May 10, 1996, the bankruptcy court entered an order denying the motion to appeal out of time without prejudice. Baheth filed an amended motion to file an appeal out of time on May 15, 1996, and on May 20, 1996, the court ordered Baheth's May 3rd notice of appeal stricken from the record and issued an order, which was entered on May 21, 1996, denying the amended motion. Baheth appealed the May 21st order in federal district court, which affirmed the bankruptcy court's order denying the amended motion to file an out of time appeal. Baheth now appeals the district court's judgment in this court. Baheth filed its notice of appeal of the district court judgment on December 23, 1996. On January 30, 1997, however, Fidelity filed a motion in this court to dismiss Baheth's appeal for failure to comply with FED.R.APP.P. 6(b)(2)(ii), which states in part, "[w]ithin 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals." Baheth never filed a statement of the issues to be submitted on appeal with this court (other than filing the actual Appellant's Brief on March 6, 1997), and it has never designated the record on appeal. The motion to dismiss was carried with the case; it is unnecessary to address the merits of the appeal, because dismissal of the appeal is warranted for Baheth's deliberate failure to comply with Rule 6.

DISCUSSION

[1] It is instructive to look at Bankruptcy Rule 8006 for guidance in this matter. Rule 6(b)(2)(ii) clearly refers to and parallels Bankruptcy Rule 8006's requirement that a party appealing to a district court or bankruptcy appellate panel "file with the clerk and serve on the appellee a designation of

the items to be included in the record on appeal and a statement of the issues to be presented." As Bankruptcy Rule 8001(a) makes clear, "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal " (emphasis added). Other circuits have held that an appellant's failure to comply with procedural rules such as Rule 8006 warrants dismissal of the appeal pursuant to Rule 8001(a). See Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir.1994) (affirming district court's judgment dismissing appellants' appeal for failure to comply with Bankruptcy Rules 8006 and 8009(a)); Serra Builders, Inc. v. John Hanson Savings Bank FSB, 970 F.2d 1309, 1311 (4th Cir.1992) (affirming the district court's sanction of dismissal for appellant's failure to file its designation of the record pursuant to Rule 8006 until twenty-five days after filing notice of appeal); but cf. Fitzsimmons v. Nolden, 920 F.2d 1468, 1472 (9th Cir.1990) (observing that district court must first consider alternative sanctions in lieu of dismissal for failure to comply with Rule 8006 unless the case presents egregious circumstances such as bad faith on the part of the appellant).

[2] Although this court has never addressed the issue, we conclude that failure to comply with Rule 6(b)(2)(ii) authorizes this court, in its discretion, to impose sanctions including dismissal of the appeal. As for whether there are any mitigating factors, Baheth offers no justification for its failure to comply with Rule 8006's requirements in a timely manner, other than the bald and belated assertion that this is not a bankruptcy case, and therefore, the bankruptcy court lacked jurisdiction. After a scheduling conference with the attorneys for each party on March 5, 1996, however, the bankruptcy court issued on March 15, 1996 an Order Following Scheduling Conference that specifically stated:

"This proceeding is a 'core' proceeding as described in 28 U.S.C. 157(b)(2)(A). Neither party wishes to contest the status of this proceeding as a core or noncore proceeding. The Court determines that this is a core proceeding and will enter a final judgment rather than issue proposed findings of fact and conclusions of law, pursuant to Bankruptcy Rule 9033" (emphasis added). Baheth does not contest the bankruptcy court's determination that both parties had consented to its trying the case.

[3] Baheth nevertheless contends in defense of its not abiding by FRAP 6(b)(2)(ii) that the bankruptcy court completely lacked subject matter jurisdiction. There are two problems with this approach. First, Baheth cannot bootstrap its argument on the merits into a defense against having to comply with the procedural rules. Until and unless the determination of bankruptcy court jurisdiction is overturned, Baheth was bound to comply with the court's judgment--and the procedural consequences thereof. [4] Second, Baheth is wrong on the jurisdictional point. Baheth's suit seeking damages from a trustee and the surety on the bond for the trustee's actions in obtaining an injunction to prohibit Baheth from disposing of the assets of the estate constituted, at the very least, a matter "related to a case under title 11" within the meaning of 28 U.S.C. 157(a). See, e.g., In re Ferrante, 51 F.3d 1473, 1476 (9th Cir.1995) (stating that a suit that involved trustees' duties under the Bankruptcy Code to administer estate property and a surety's liability on its bond for the estate's benefit "involves a core issue"); Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 583-84 (6th Cir.1990) (finding that a suit against a trustee was "related to" a bankruptcy proceeding because the estate would have to reimburse the trustee if the suit were successful). Consequently, it was appropriate for this case to be referred to the bankruptcy court. Furthermore, by failing to object to the bankruptcy court's assumption of core jurisdiction, Baheth impliedly consented to the court's entry of final

judgment. In re Texas General Petroleum Corp., 52 F.3d 1330, 1337 (5th Cir.1995). Thus, the bankruptcy court was statutorily authorized to enter judgment in this case, even if the matter could be characterized as non-core. See id.; 28 U.S.C. 157(c)(2); 28 U.S.C. 636(c).

Baheth also argues that it would not be in the interest of justice to dismiss this appeal for failure to comply with Rule 6, in part because the clerk of the court, according to Baheth, sent notice on January 22, 1997 that the record on appeal had been filed with this court. Although the record on appeal was filed on January 20, 1997, this does not affect Baheth's underlying burden to file with the court and serve on appellees a statement of the issues and designation of the record, nor has the underlying purpose of Rule 6(b)(2)(ii) been served. (FN2) In light of Baheth's failure to comply with both the deadline and substantive requirements of Rule 6(b)(2)(ii), it is proper to dismiss Baheth's appeal, and this court need not proceed to the merits and determine whether Baheth's failure to file a timely appeal of the bankruptcy court order in district court was due to excusable neglect. (FN3)

CONCLUSION

For the foregoing reasons, Baheth's appeal is dismissed.

FN1. The order prohibited Baheth from disposing of the property of M.A. Baheth Construction Co., Inc., the chapter 7 debtor for which Schott was the trustee. Fidelity was the surety on Schott's bankruptcy trustee bond.

FN2. Rule 6(b)(2)(ii) serves a specific purpose--the advisory notes to subdivision (b)(2) state in part: "Paragraph (ii) calls for redesignation of the appellate record assembled in the bankruptcy court pursuant to Rule 8006 of the Rules of Bankruptcy Procedure. After an intermediate appeal, a party

may well narrow the focus of its efforts on the second appeal and a redesignation of the record may eliminate unnecessary material. The proceedings during the first appeal are included to cover the possibility that independent error in the immediate appeal, for example failure to follow appropriate procedures, may be assigned in the court of appeals."

FN3. Given the procedural history and posture of this case, we can conceive of no effective alternative to dismissal, nor does the appellant advocate that any such alternative exists.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

M.A. BAHETH AND COMPANY, INC. — **CIVIL ACTION**

VERSUS — **NO. 96-3324-A**

MARTIN A. SCHOTT

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that the Order of the bankruptcy court dated May 20, 1996 is hereby AFFIRMED, and this action is hereby DISMISSED.

Baton Rouge, Louisiana, November 25, 1996.

S/JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

UNITED STATES DISTRICT FOR MIDDLE DISTRICT OF LOUISIANA

THE UNITED STATES FOR THE USE OF M.A. BAHETH & CO., INC. — **CASE NO. 95-1796-B-M2**

VERSUS — **ADVERSARY # 96-1001**

ORDER

Considering the Motion for Summary Judgment filed on behalf of Martin A. Schott and Fidelity and Deposit company of Maryland; the law and evidence being in favor of the defendants and no opposition having been filed;

IT IS HEREBY ORDERED that the Motion for Summary Judgment be and is hereby granted;

IT IS HEREBY ORDERED that the captioned adversary proceeding be and is hereby dismissed with prejudice.

Baton Rouge, Louisiana, this 19 day of April, 1996.

S/LOUIS M. PHILLIPS
UNITED STATES BANKRUPTCY JUDGE

RESPECTFULLY SUBMITTED BY:

s/ Pamela Magee
Attorney for the Trustee of
M.A. Baheth Construction, Inc.
7906 Wrenwood Blvd., Suite A
Baton Rouge, LA 70809
(504) 925-8770

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE: THE UNITED STATES FOR THE USE OF M.A. BAHETH & CO., INC. — **CASE NO. 95-1796-B-M2**

VERSUS — **ADVERSARY # 96-1001**

MARTIN A. SCHOTT, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

MOTION TO SUBSTITUTE COUNSEL

On motion of STEVEN YOUNG , and LINDA RITZIE, on suggesting to the Court that STEVEN YOUNG desires to withdraw as attorney for M.A. BAHETH & CO., INC., herein, that LINDA RITZIE sesires to be substituteed as attorney of record for M.A. BAHETH & CO., INC., herein, and that MA.A. BAHETH & CO., INC., has consented to such substitution.

Respectfully submitted:

s/ Steven Young (#13765)
1606 Scenic Highway
Baton Rouge, LA 70802
(504) 383-3675

s/ Linda Ritzie (#20342)
921 N. Lobdell Av., Ste. G
Baton Rouge, LA 70806
(504) 92509586

UNITED STATES DISTRICT FOR MIDDLE DISTRICT OF LOUISIANA

IN RE: THE UNITED STATES FOR THE USE OF M.A. BAHETH & CO., INC. **CASE NO. 95-1796-B-M2**

VERSUS **ADVERSARY # 96-1001**

MARTIN A. SCHOTT, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

ORDER

Considering the foregoing motion; IT IS ORDERED that STEVEN YOUNG be hereby permitted to withdraw, and that LINDA RITZIE be enrolled as attorney of record, for M.A BAHETH & CO., INC., herein.

Signed in Baton Rouge, Louisiana, this 9 day of May, 1996.

S/ Louis phillips
Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA
412 NORTH FOURTH STREET, ROOM 301
BATON ROUGE, LOUISIANA 70802

CLERK OF COURT **TELEPHONE (504 389-0211**

April 29, 1996

CASE NUMBER 96-1001
THE ENCLOSED DOCUMENTS ARE BING RETURNED FOR THE REASON INDICATED

___ 1. The case number and case name do not correspond. Please clarify.

_X_ 2. This case was closed on 4/19/96 .

___ 3. Please complete, date and sign the enclosed Proof of Claim form.

___ 4. Documents should be filed in the District in which the case is prnding.

___ 5. Any request for a records search must include a $15.00 search fee. Copies of records will require an additional fee of $ .50 per page. Check must be made payable to Clerk, U.S. Bankruptcy Court.

___ 6. A filing fee of $ ____ is required to file _____

___ 7. Discovery documents and responses thereto are not to be filed with the Clerk's Office. Local Rule 608.

___ 8. An original sugnature is required.

___ 9. A transfer of claim must specify the amount of claim to be properly processed. Please refer letter to the Direcror of Higher Eductaion Assistance Foundation, dated October

12, 1993.

___10. Other _____

s/ Gina C. Harrison
Deputy Clark

APPENDIX F

UNITED STATES DISTRICT FOR MIDDLE DISTRICT OF LOUISIANA

IN RE: THE UNITED STATES FOR THE USE OF M.A. BAHETH & CO., INC. **CASE NO. 95-1796-B-M2**

VERSUS **ADVERSARY # 96-1001**

MARTIN A. SCHOTT, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

ORDER DIRECTING THAT DOCUMENTS BE STRICKEN FROM ADVERSARY RECORD

A Notice of Appeal was filed May 3, 1996, and a Notice Regarding Appeals to the District Court was filed on May 7, 1996, however, an **ORDER DENYING** the Motion to File Appeal Out of Time filed by Linda Ritzie was entered May 10, 1996, therefore;

IT IS ORDERED that the Notice of Appeal (#16) and the Notice of Appeals (#17) be stricken from the Adversary Proceeding, and the notice of appeals shall be returned.

Baton Rouge, Louisiana, May 20, 1996.

S/ LOUIS M. PHILLIPS
UNITED STATES BANKRUPTCY JUDGE